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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

United States of America, Plaintiff, v. David Boyer Prince, Defendant.	Case No.: CR 10-00153 JF (PSG) **NON-PARTY DR. LANCE LEE'S MOTION TO QUASH THE UNITED STATES' TRIAL SUBPOENA AND DEFENDANT'S FED. R. CRIM. P. 17(C) SUBPOENA FOR THE PRODUCTION OF DOCUMENTS** Date: July 21, 2011 Time: 1:30 p.m. Place: Courtroom 5 (San Jose) Judge: Hon. Paul Singh Grewal

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DOCUMENT NO 127 CSA's INITIALS
DISTRICT COURT CRIMINAL CASE PROCESSING

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NOTICE OF MOTION AND MOTION TO QUASH SUBPOENA IN A CRIMINAL CASE

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 21, 2011 at 1:30 p.m., or as soon thereafter as the matter may be heard, at the United States District Court for the Northern District of California, 280 South 1st Street, San Jose, California, in the Courtroom of The Honorable United States Magistrate Judge Paul Singh Grewal, Non-Party Lance Lee, Ph.D, Ed.D ("Dr. Lee") will and hereby does move the Court for an order quashing the Government's trial subpoena for the production of documents, dated June 15, 2011, and the Federal Rule of Criminal Procedure 17(c) subpoena served on Dr. Lee by Defendant David Boyer Prince's counsel, which also demands the production of documents from Dr. Lee. The return date on the Defendant's subpoena is July 21, 2011.

Dr. Lee makes this Motion on the following grounds:

1. Both subpoenas should be quashed on the grounds that the act of producing documents in response to Defendant's and the Government's document requests concerning the investment entities at the heart of the Government's criminal case against Defendant, would violate Dr. Lee's Fifth Amendment right against self-incrimination; and

3. The Court should quash the Defendant's Rule 17(c) Subpoena pursuant to Fed. R. Crim. P. 17(c)(2) on the independent grounds that it is insufficiently specific and constitutes an unreasonable and oppressive fishing expedition.

The Non-Party's Motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities set forth below, the Declaration of Tyler G. Newby filed concurrently herewith, the pleadings and papers on file in the action, and on such other and further argument and evidence as the Court may consider on this matter.

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INTRODUCTION AND BACKGROUND

On or about March 3, 2010, a Grand Jury sitting in the Northern District of California returned an indictment charging David Boyer Prince with twelve counts of wire fraud in connection with the operation of several investment entities. The indictment alleges that Defendant controlled and operated three investment entities known as Dawnstar Alliance LLC, the Leopard Fund and MJE Invest! ("the Charged Funds"). Indictment ¶ 2. The indictment further alleges that "Prince and another individual" used a Nevada company known as MJE Sales, LLC to manage the MJE! Invest and Leopard funds. Indictment ¶¶ 3-4. According to the indictment, between August 2005 and continuing until January 2007, Defendant and unnamed other persons devised a scheme to defraud investors by making false representations to induce investors into investing into the Charged Funds. Indictment ¶ 6. Among other things, the indictment alleges "Prince and others acting on his behalf" made false and fraudulent statements promising guaranteed return on investment principal, high rates of return, and interest statements that were claimed to reflect fund performance. Indictment ¶ 8. The matter is set for trial on August 29, 2011.

Dr. Lance Lee is not charged or otherwise named in the indictment. On or about June 17, 2011, the government served on Dr. Lee's counsel a trial subpoena commanding him to appear to testify at trial and to produce any and all records "for any and all investments or loan programs operated solely, or in part, by David Boyer Prince, or with David Boyer Prince, or on behalf of David Boyer Prince," including the Charged Funds. *See* Declaration of Tyler G. Newby, Ex. A. The next week, on June 24, Defendant's counsel served a subpoena pursuant to Fed. R. Crim. P. 17(c) on Dr. Lee's counsel seeking the pre-trial production of documents in response to eleven similarly broad document requests concerning the Charged Funds, including requests for documents "that refer or relate to [Dr. Lee's] participation or appointment as a member or officer" of the Charged Funds. Newby Decl. Ex. C. Defendant's requests go even beyond those already broad categories, by seeking such records as "any and all computers, Personal Digital Assistants (PDA's), flash drives, hard drives or any other data storage device that you owned, had access to or were in possession of from 2005 to the present" without regard to whether the devices were for business or personal use (Request 7); all pages from Dr. Lee's "day timer" or "personal planner" from July 2005 to December 2006 (Request 8); and all documents from Dr. Lee's address books from 2005 to the present (Request 10). Defendant's subpoena seeks production of records by July 21, 2011.

ARGUMENT

I. THE ACT OF PRODUCING RECORDS IN RESPONSE TO THE GOVERNMENT'S AND DEFENDANT'S SUBPOENAS WOULD VIOLATE DR. LEE'S FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION

Dr. Lee seeks an order quashing both the Defendants' broad Rule 17(c) subpoena and the Government's trial subpoena on the grounds that the very act of producing responsive documents would tend to implicate Dr. Lee's involvement in the alleged fraudulent scheme that is at the heart of the indictment, in violation of his rights under the Fifth Amendment of the United States Constitution. The Fifth Amendment protects "a person ... against being incriminated by his own compelled testimonial communications." *Fisher v. United States*, 425 U.S. 391, 409 (1976). The Fifth Amendment's protections are not limited to the defendant in a pending criminal case, but also apply in civil, administrative and criminal proceedings when a person's testimony may incriminate him in a future criminal prosecution. *See, e.g., Maness v. Meyers,* 419 U.S. 449, 464, (1975) (Fifth Amendment is not limited to criminal proceedings); *United States v. Rendahl,* 746 F.2d 553, 556 (9th Cir.1984) (criminal proceeding need not be pending for a person to invoke the privilege).

In the context of a subpoena demanding the production of records in a criminal case, the Fifth Amendment attaches where the act of production itself is both testimonial and self-incriminating. *United States v. Doe*, 465 U.S. 605, 612 (1984) [hereinafter "*Doe I*"]. The act of production privilege applies regardless of whether the government or a defendant has issued the subpoena. *See, e.g. United States v. Ail,* 2007 WL 1229415 (D. Or. April 24, 2007) (quashing Rule 17(c) subpoena, in part, because the act of production would have impinged on non-parties' Fifth Amendment rights). Producing documents in response to a subpoena has three testimonial or "communicative aspects" that are protectable by the Fifth Amendment "wholly aside from the contents of the papers produced." *Fisher v. United States*, 425 U.S. 391, 410 (1976). In producing documents requested in a subpoena, an individual admits (1) that the documents "exis[t]"; (2) that they are in her "possession or control"; and (3) that they are "authentic." *E.g.*, *Doe v. United States*, 487 U.S. 201, 209 (1988) [hereinafter *Doe II*]; *Doe I*, 465 U.S. at 613 & n.11; *Fisher*, 425 U.S. at 409-10. Furthermore, "[c]ompelled testimony that communicates information that may 'lead to incriminating evidence' is privileged even if the information itself is not inculpatory." *United States v. Hubbell*, 530 U.S. 27, 38 (2000).

Here, the Government seeks to compel Dr. Lee to produce all records referencing the Charged Funds, including concerning the operation of the funds. The very act of producing such documents, if they exist, would be potentially self-incriminating, in that the production would show Dr. Lee's possession of documents concerning the Charged Funds' operation and would authenticate such documents. If the documents exist, their production could also be used to show Dr. Lee's awareness of and involvement in the alleged fraudulent scheme. Because Dr. Lee does not wish to waive his Fifth Amendment right against self-incrimination, Dr. Lee respectfully requests that the Court quash the Government's June 17 subpoena for the production of documents.

The same argument holds true for Defendant's Rule 17(c) subpoena to Dr. Lee. Requests 1 through 3 seek "any and all documents" referring or relating to the Charged Funds, including documents that refer or relate to Dr. Lee's "participation or appointment as a member or officer" of the Charged Funds. *See* Newby Decl. Ex. B. Request 4 seeks documents relating to persons who allegedly invested money in the Charged Funds, Request 5 seeks documents concerning communications between "you or any person affiliated with" the Charged Funds and a specified individual, and Request 11 seeks documents relating to persons with whom "You discussed investing money" in the Charged Funds. *Id.* In addition to these requests, Requests 6-10 are extremely general, seeking documents concerning certain individuals, whose relevance to the case is not apparent, as well as all of Dr. Lee's computers, diaries and lists of phone numbers from 2005-2006.

As with the government's subpoena, the very act of producing the requested documents could be construed as showing that Dr. Lee was involved in the operations of the Charged Funds.

Accordingly, Dr. Lee seeks an order quashing these requests, on the grounds that producing the requested documents would violate his Fifth Amendment Right against self-incrimination.

II. COMPLIANCE WITH DEFENDANT'S RULE 17(c) SUBPOENA'S OVERLY BROAD REQUESTS WOULD BE UNREASONABLE AND OPPRESSIVE

Compliance with Defendant's exceptionally broad document requests would require that Dr. Lee produce all computer media he used in 2005, his diaries, calendars and records of phone calls, and should be quashed as unreasonable and oppressive. *See* Fed. R. Crim. P. 17(c)(2). As the party seeking records pursuant to Rule 17(c), Defendant bears the burden of showing "good cause" for their pretrial production. *United States v. Beckford*, 964 F. Supp. 1010, 1022 (E.D. Va. 1997) (memorandum opinion) (citing Wright, Federal Practice and Procedure 2d § 275, at 155). Specifically, a party seeking records through a Rule 17(c) subpoena must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition." *United States v. Nixon,* 418 U.S. 683, 699-700 (1974). The standards established in *Nixon* are designed to prevent the potential of transforming the subpoena *duces tecum* into a vehicle for expansive pretrial discovery. *See id.* at 698. To meet this burden, the Defendant "must clear three hurdles: (1) relevancy; (2) admissibility; [and] (3) specificity." *Id.* at 700.

Defendant's wide-ranging subpoena does not satisfy *Nixon's* relevancy or specificity requirements. *Nixon* requires that the party requesting the information identify the item sought and what the item contains, among other things. Defendant's subpoena misses this requirement by a wide mark. Requests 7, 9 and 10 are not even tied to the Charged Funds, but seek general production of computer media, diaries and phone logs without any limitation as to subject matter. Similarly, Requests 6 and 8 seeks all records pertaining to certain individuals, without any indication of their relevance to the allegations in the indictment. Finally, Requests 1 through Five and 11 seek all documents mentioning any of the funds alleged to have been involved in perpetrating the fraudulent scheme detailed in the indictment. Newby Decl. Ex. B. None of these requests identifies a specific document, and Requests 6 through 10 give no indication of how the requested records relate to the issues in the underlying criminal case. This is the very definition of a fishing expedition that is not permitted by Rule 17(c). *See, e.g., United States v. Reed*, 726 F.2d 570, 577 (9th Cir.1984) (requests to produce an entire file are not sufficiently specific). Furthermore, because Defendant's subpoena lacks the requisite specificity, the Court need not conduct an *in camera* review of any documents that may be Mr. Lee's possession. *See, e.g., United States v. Morris*, 287 F.3d 985 (10th Cir. 2002). Accordingly, the Court should quash Defendant's subpoena, for reasons independent of Dr. Lee's assertion of his Fifth Amendment rights.

CONCLUSION

For the reasons stated above, non-party Dr. Lance Lee respectfully requests that the Court enter an Order quashing Defendant's June 20, 2011 subpoena for the production of documents and the Government's June 17, 2011 subpoena to the extent it seeks the production of documents.

Dated: July 7, 2011

FENWICK & WEST LLP

By: ______________________
Tyler G. Newby
Attorneys for Non-Party Lance Lee

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